



COMMONWEALTH of VIRGINIA

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EXCERPT FROM THE PROCEEDINGS OF THE STATE WATER CONTROL BOARD AT ITS APRIL 27, 2009 MEETING

MINUTE NO. 2 – Proposed Rulemaking to Amend Nutrient Waste Load Allocations for Merck, Inc. in 9 VAC 25-720-50.C. (Water Quality Management Planning Regulation, Shenandoah-Potomac River Basin).

STAFF PRESENTATION: Rick Weeks/DEQ Deputy Director made the staff presentation on proposed amendments to revise the total nitrogen (TN) and total phosphorus (TP) waste load allocations (WLAs) in 9 VAC 25-720, as requested by Merck. The Board deferred final action on this rulemaking at their December 4, 2008 meeting, directing the staff to have a considered discussion with Merck and citizen conservation groups that would give an alternative to the effluent numbers originally presented.

Staff met several times with Merck and citizen group representatives (CBF, Shenandoah and Potomac Riverkeepers), along with staff from the Virginia Economic Development Partnership and Rockingham County from January to March 2009. The focus of these discussions was the preference on everyone's part that Merck be able to acquire allocations and thus avoid the need to raise the "cap" on nutrient loading for the Shenandoah River. However, the Nutrient Credit Exchange Law only allows "new or expanding" facilities to acquire allocations. Therefore, it would take a regulatory action by the Board to facilitate a purchase of an allocation by Merck and staff would address this element in the recommendations to follow.

Through a combination of actions including a rulemaking to facilitate securing of allocations by Merck from other Shenandoah-Potomac dischargers and the expected availability of nutrient compliance credits under the trading program if needed, DEQ staff is confident there will be credits available in the basin over the next five years. In the unlikely event that credits are not available, Merck has committed funds in the amount they would have spent on credits for other nutrient reduction projects in the region.

In summary, staff sees this combination as being the best resolution to allow Merck its needed compliance certainty while maintaining the nutrient "cap", in the interim and over the long term. The success of this approach is assured by the following:

1. Staff fully expects there will be nutrient credits available until the second regulatory action is completed;

2. Merck has agreed, that if there is a year when they need to purchase credits and none are available, they will deposit equivalent funding into an escrow or trust to be disbursed to fund an environmental project in the Shenandoah Valley with preference given to nonpoint source nutrient reduction projects; and,
3. While the recommendation assures that credits need to be purchased in the interim, completing the second regulatory action is expected to occur prior to the end of 2011, the first year the nutrient allocations in the Watershed General Permit are effective; thereby, eliminating the need for the credit purchases by Merck and ensuring the current regulatory based nutrient allocations are maintained in the Shenandoah-Potomac basin.

COMMENTS: The Board then heard comments and presentations from several speakers that had been involved in the rulemaking process.

- 1) Craig Kennedy, Merck Inc. – Merck is committed to environmental protection and corporate responsibility, but independent compliance capability is also a necessity. Appreciated the Board's consideration and creative thinking by the advisory group that lead to the proposal being brought forward today, which Merck supports.
- 2) Joe Tannery, Chesapeake Bay Foundation – Agreed that the proposal has moved this issue forward, but CBF still cannot support the recommendation. While Merck's compliance assurance is made certain under the proposal, all other stakeholders should receive similar assurance regarding protection of water quality standards and increased nutrient waste load allocations work against this. If the plans fail, then the result is a permanent increase in loads to a basin already "over-allocated" for total nitrogen. Requested contingency plans to include a requirement that the increased allocations do not become effective unless and until the additional "offset" loads are identified with assurance of being transferred to/secured by Merck.
- 3) Dorothy Abbott, citizen – opposes increased nutrient waste load allocations.
- 4) Ken Smith, Virginia Watermen's Association - opposes increased nutrient waste load allocations.
- 5) Jeff Kelble, Shenandoah Riverkeeper – While he shares CBF's sense that the plan doesn't ensure "no-net-increase" for the basin, he neither supports nor opposes the proposal. Is concerned about the precedent this might set for other dischargers seeking increased nutrient allocations, but if the Board is convinced this solution will protect water quality then they should vote to approve.

STAFF RECOMMENDATIONS and BOARD ACTION: Staff presented the following recommendations for Board consideration, which reflect changes made since the proposal was brought before the Board at their December 4, 2008 meeting:

1. Adopt the proposed changes to the Water Quality Management Planning Regulation (9 VAC 25-720-50.C), as shown:

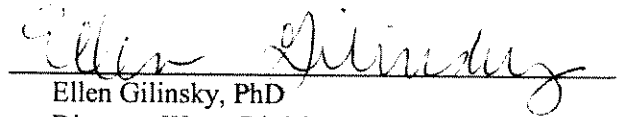
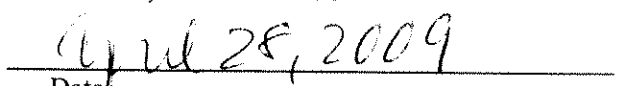
VA Water Body ID	VPDES	Total Nitrogen WLA (lbs/yr)	Total Phosphorus WLA (lbs/yr)
B37R	VA0002178	14,619 [14,619] <u>43,835</u>	1,096 [1,096] <u>4,384</u>

Notes: (10) Merck-Stonewall – (a) on January 1, 2011, the following waste load allocations [WLAs] are effective and supersede the existing WLAs: total nitrogen of 43,835 lbs/yr and total phosphorus of 4,384 lbs/yr; (b) waste load allocations will be reviewed and possibly reduced based on "full-scale" results showing the optimal treatment capability of the 4-stage Bardenpho technology at this facility, consistent with the level of effort by other dischargers

in the region. The "full scale" evaluation will be completed by December 31, 2011 and the results submitted to DEQ for review and subsequent Board action; (c) in any year when credits are available after all other exchanges within the Shenandoah-Potomac River Basin are completed in accordance with §62.1-44.19:18 of the Code of Virginia, Merck shall acquire credits for total nitrogen discharged in excess of 14,619 lbs/yr and total phosphorus discharged in excess of 1,096 lbs/year; and (d) the allocations are not transferable and compliance credits are only generated if discharged loads are less than the loads identified in paragraph (c).

2. Direct staff to initiate a rulemaking to reduce or remove unused allocations of other facilities within the Shenandoah-Potomac River Basin, preferably in the area of Merck's discharge, to offset the needed increased nitrogen and phosphorus allocations for Merck due to the technological limitations of treatment.
3. Direct the staff to provide an annual report on unused nutrient allocations for each significant discharger. This will include a comparison of actual loads vs. allocations. For municipal facilities, this will also include a comparison of each facility's constructed capacity vs. the design flow used to establish the allocations. For industrial facilities, updates will be provided on any known changes to the basis for the original allocation.

The Board voted unanimously to adopt the staff recommendations.


Ellen Gilinsky, PhD
Director, Water Division

Date